DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SAM BIRD, Judge

CA05-1306

OCTOBER 25, 2006

SANDRA NOONAN
APPELLANT

V.

ROBERT F. NOONAN
APPELLEE

APPEAL FROM THE JOHNSON COUNTY CIRCUIT COURT
[NO. DR-01-167]

HON. DENNIS C. SUTTERFIELD, JUDGE

AFFIRMED

This is a change-of-child-custody case. Appellant Sandra Noonan and appellee Robert F. Noonan were married in 1984. In 1997 appellee completed a medical residency in Fayetteville and began practice as a family physician in Clarksville. The couple separated in 2001, and appellant moved to Fayetteville with their three children. By order of the Johnson County Circuit Court entered on July 9, 2004, appellee was granted a divorce from appellant on the grounds of continued separation for a period in excess of eighteen months. All other issues were reserved for final adjudication. In an order of November 19, 2004, the trial court divided the marital property and, pursuant to the parties' agreement, granted appellant custody of the children with visitation to appellee.

In a motion for contempt filed on January 7, 2005, appellee alleged that appellant failed to provide necessary medical treatment and to provide clothing for visitations and trips.

A series of filings by appellee culminated with his June 13, 2005 amended petition for contempt and change of custody. Appellee presented his case at a two-day hearing on July 14 and 28, 2005. His evidence included testimony by Paul L. Deyoub, Ph.D.; testimony by appellee; and Dr. Deyoub's July 11, 2005 court-ordered psychological evaluations of appellee, appellant, and the couple's three children–Rochelle, Drake, and Corinne. Appellant presented no evidence.

In a written order of August 18, 2005, the trial court granted appellee's petition to change custody only as to the two younger children, Drake and Corrine. Custody of sixteen-year-old Rochelle was left with appellant. Appellant now appeals the change-of-custody order, contending that the trial court erred in finding that a material change in circumstances had occurred sufficient to justify the change of custody in barely five months' time between entry of the final order and appellee's motion for a change of custody. We affirm.

In the initial order of custody, the court noted and approved the parties' agreement that "there should be flexibility concerning the visitation for the benefit of the children." The order set forth a visitation schedule "to be strictly observed" in the absence of the parties' agreeing to additional visitation, and it specified that school and health records should be made available to the non-custodial parent immediately upon request. Other provisions were these:

> Derogatory Remarks: Both parties are enjoined and restrained from making derogatory remarks about the other parent in the presence of the children. Violation of this provision could result in a loss of custody or visitation. The court considers it to be the child's right to grow up respecting both of his or her parents.

. . . .

That all children are ordered to see a child psychiatrist to be decided upon by the parties. For the minor child, Corinne, an assessment shall be made whether she needs a treatment program for the condition that causes her to remove her eyelashes.

By letter opinion of July 28, 2005, the trial court found that the mental and emotional stability of the two younger children would best be served by a change of custody to appellee. The court noted that Rochelle was in high school and that "damage had already been done by her mother's misconduct." The court reluctantly agreed with Dr. Deyoub's assessment that it would not be in Rochelle's best interest to force her to live with her father where she did not want to be.

The trial court's change-of-custody order of August 18, 2005, which incorporated the letter opinion, included the following findings:

> 2. [T]he evidence clearly establishes that, since the entry of the Decree of Divorce in this matter, [appellant] has engaged in worsening conduct clearly designed to alienate the children from their father. The mother's efforts have met with considerable success in regard to the minor child, Rochelle, but not in regard to the other two children. . . .
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> 3. The initial determination of custody at the time of divorce was based upon the agreement of the parties and the presumption that [appellant] was the fit and proper person to have custody of these children. The evidence establishes a material change of circumstances since the entry of the Decree, demonstrating a deterioration in [her] skills, and an animosity toward her continuing duty to encourage and promote the children's relationship with the non-custodial parent.
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> 4. That in addition to the above, the Court makes the following findings concerning change of circumstances:

a. That since the entry of the Decree of Divorce, the mother has consistently and unreasonably denied the father additional visitation and telephone access to the minor children.

b. That since the entry of the Decree of Divorce, the children have been in the middle of constant conflict between the parents, and the Court finds that the source of that conflict is primarily between the mother's bitterness and anger at the father regarding the dissolution of their marriage. The mother has obviously made derogatory comments about the father in order to poison their love and affection toward him.

c. That the evidence established that this conflict has worsened to such an extent that the mother has neglected the health and medical needs of these children, and this also represents a change of circumstances.

5. That the Court finds that Dr. Paul Deyoub's testimony was credible and helpful to the Court in understanding the dynamics of this family, which are relevant to the important decision of custody. The Court further finds that Dr. Deyoub's detailed July 11, 2005, psychological evaluation report provided credible expert analysis of the increasing problems that this family has experienced since the entry of the Decree of Divorce in this matter.

The court ordered that appellant would receive the same visitation that appellee had previously received, with the addition that "the children will all be together for visitation periods" with both parties.

In reviewing domestic-relation cases, we consider the evidence de novo, but we will not reverse a trial court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the trial court to view and judge the credibility of the witnesses. *Hamilton v. Barrett*, 337 Ark. 460, 990 S.W.2d 520 (1999). This deference to the trial court is even greater in cases involving child custody, as a heavier burden is

placed on the trial court to utilize to the fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.* Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Id.* A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that either were not presented to the trial court or were not known by it at the time the original custody order was entered. *Id.* Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

Appellant contends that the trial court erred in finding that the evidence demonstrated a deterioration in her skills and an animosity toward her continuing duty to encourage and promote the children's relationship with the non-custodial parent. She does not dispute that she "remains saddened and angered by being divorced" after helping appellee through medical school and the initial stage of his practice, bearing him three children, and then being replaced with a new wife, a woman with whom he co-habitated prior to the divorce. Appellant asserts that these feelings, as well as her attitude about her duties to raise the children and to follow the court's visitation schedule, did not change from the year 2001.

Appellant argues that, except for appellee's changing his mind about wanting custody, there were no material changes in circumstance adversely affecting the children in the five

months between the initial custody determination and the time when appellee decided to seek the change of custody. She points to testimony by appellee that there were many issues between the parties for years regarding her manner of raising the children, and she notes that Dr. Deyoub's report repeatedly refers to the four-year period when the children were in her custody. She asserts that custody "was litigated at the child-custody hearing, by way of [appellee's] conscious decision and agreement that his wife was the proper person to have custody of their children."

Citing *Carver v. May*, 81 Ark. App. 202, 101 S.W.3d 256 (2003), appellant asserts that a trial court's contempt power should be used prior to the more drastic remedy of changing custody. She distinguishes the present case from *Carver*, where the custodial parent's attempts to alienate the children from their father included "extreme" interference with visitation as well as unsubstantiated allegations of drug use and sexual abuse, and this court affirmed the trial court's finding that the best interest of the children required that they be removed from that situation. Relying upon *Eaton v. Dixon*, 69 Ark. App. 9, 9 S.W.3d 535 (2000), she contends that our appellate courts "have frequently found a prohibition against separating siblings in the absence of exceptional circumstances." Appellant notes that the children in the present case, unlike the half-siblings in *Eaton*, are full siblings who always had lived together prior to the change of custody.

Although our review of the evidence is de novo, we defer to the trial court regarding credibility of the witnesses. Appellee and Dr. Deyoub testified to instances of appellant's

lack of cooperation during appellee's visitation, such as failing to send any underwear for a five-day Thanksgiving visit, refusing to return the telephone to the children when she conversed with appellee after they did, telling appellee to get school information through his own efforts rather than sharing documents with him, refusing to provide Rochelle's birth certificate for driver's training, waiting more than a month before responding to appellee's request that Drake needed an opthamological examination, and sending Drake to visitation wearing broken glasses that were taped together with the tape blocking his vision. Appellee testified that he had asked for visitation to be switched or for flexibility thirteen times since July of 2004, and that all thirteen requests had been rebuffed.

Dr. Deyoub stated that appellant possessed anger against appellee for a three-year period, which "she holds, and projects, and transmits to these children," and that the anger was having an effect on the younger two children "or at least it will eventually, but has already had an effect on the older child." He recommended the change of custody for the two younger children in order to take them "out of a situation where the mother has the ongoing anger for the father and negativity for the father, placing them with the father who I think will provide a more healthy environment without all that conflict."

Dr. Deyoub testified that appellant had taken "a stance" of following the set schedule of visitation and not being flexible, and he opined that the children would benefit from appellee's being able to schedule something outside of the current visitation and that accommodation should be made. He stated that appellant's "rather rigid or obsessive

personality style along with the depression and feelings of anger" affected her post-divorce adjustment and communication with appellee. He said that "she's gonna be angry . . . when she has to deal with him about the children. Things like the exchange and their medical care." Dr. Deyoub said that her anger affected her ability to work with appellee and to cooperate for the sake of the children. He related learning from appellee that although appellee would have the children visiting with him in Ozark, which was closer to Fayetteville than Clarksville, appellant would insist on picking the children up in Clarksville, which meant that appellee had to drive the children from Ozark back to Clarksville, in the wrong direction, in order to deliver the children to appellant. When Dr. Deyoub asked appellant why she did this, she replied that she was "going to stick with the agreement."

Dr. Deyoub and appellee testified that appellant had neglected seeking medical attention for Corrine and Drake. Dr. Deyoub and appellee testified that Corrine needed therapeutic counseling to address her trichotillomania, an anxiety disorder in which a person pulls out her hair or eyelashes. Dr. Deyoub stated his observation that Corrine had very few eyelashes left or none at all; that she was embarrassed and did not know why she did it; and that it had become a habit. He testified that appellee had well-placed concerns that the condition should be addressed but that appellant thought is was not "any big deal" and would resolve itself. Appellee testified that the children had not seen a psychiatrist, despite the fact that he gave appellant the names of two psychiatrists pursuant to the court's order that the children see a psychiatrist to be decided upon by the parties.

Both appellee and Dr. Deyoub testified that Drake had some rectal bleeding. Appellee testified that Drake called appellee into the bathroom to show him a bloody protrusion from his rectum one morning, that appellant later came to pick the children up from visitation, and that she would barely roll down the car window to talk to appellee about it. He also testified that appellant did not initially seek a medical appointment for the situation, that eventually Drake saw a doctor and was supposed to return for a follow-up visit, that appellant believed the problem was not continuing, that appellee sent a letter to appellant telling her that the bleeding was present and asking her to take Drake for the follow-up visit, but that there had been no follow-up visit.

Dr. Deyoub stated that Drake was at an age where he wanted to emulate appellee, that Corrine was happy in his household, and that appellee's new wife would welcome the children. He opined that separation of the siblings would not do any damage:

> And their separate needs were that Drake and Corrine in my view will thrive with the father. And I think that after four years with their mother, I think this change is appropriate for them.
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> Rochelle, however, is so bonded to her mother, and to some extent negative about her father, that I think it would be disruptive to this sixteen-year-old child to move her to her dad's house. I think that father and stepmother would have some problems with her. I don't think Rochelle would accept the move. ...
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> Rochelle is–the mother has a very negative attitude toward the father and Rochelle is part of that and is highly supportive of her mother. And I think that's gonna remain the same. Actually, a justification for separating these children at this point with this recommendation is to remove Rochelle from the role that she had fulfilled with these children. Which is being with the father at the father's home kind of protector and monitor and spy. ... The mother looks toward Rochelle. So I don't think she should have that kind of role.

Dr. Deyoub stated that because the two younger children did not have a sibling bond with their sister, and because the younger children had different views than their sister regarding the father and his home, the younger children would not be damaged by not seeing their sister during the week.

We hold that evidence of the family dynamics, revealed in part through the credible testimony of Dr. Deyoub and previously unknown to the trial judge, constituted a material change of circumstances demonstrating that a modification of the decree was in the best interest of the two younger children. Similarly, appellant's failure to obtain medical care for the children and her demonstrated lack of flexibility in visitation matters, even though existing before the initial custody determination and even if in "strict observance" of the visitation schedule, were changed circumstances because the trial court had been unaware of them. Another material change of circumstance was the negative effect on the two children of appellant's anger against appellee, already manifested in their older sister's alienation against him, and was a change that either had not occurred or was not known to the trial court at the time of the initial custody award. Even if appellant's anger and emotions had not changed, there was evidence of conduct to support the trial court's findings that, after the time of the initial custody determination, the conflict between the parties worsened to such an extent that appellant neglected the health and medical needs of these children, a factor that clearly was not in their best interest. Finally, under the particular facts of this case and in light of Dr. Deyoub's opinion that the siblings' relationship would not suffer with the

teenaged daughter living with her mother and the younger siblings with their father, there was no prohibition against separating these three siblings.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.